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Chapter IX

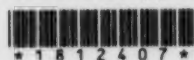
Protection of the environment in relation to armed conflicts

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Chapter IX

Protection of the environment in relation to armed conflicts

A. Introduction

1. At its sixty-fifth session (2013), the Commission decided to include the topic "Protection of the environment in relation to armed conflicts" in its programme of work, and appointed Ms. Marie G. Jacobsson as Special Rapporteur for the topic.¹

2. The Commission received and considered three reports from its sixty-sixth session (2014) to its sixty-eighth session (2016).² At its sixty-sixth session (2014), the Commission considered the preliminary report of the Special Rapporteur.³ At its sixty-seventh session (2015), the Commission considered the second report of the Special Rapporteur⁴ and took note of the draft introductory provisions and draft principles, provisionally adopted by the Drafting Committee, which were subsequently renumbered and revised for technical reasons by the Drafting Committee at the sixty-eighth session.⁵ Accordingly, the Commission provisionally adopted draft principles 1, 2, 5, 9, 10, 11, 12 and 13, and commentaries thereto, at that session.⁶ At the same session, the Commission also considered the third report of the Special Rapporteur,⁷ and took note of draft principles 4, 6 to 8, and 14 to 18 provisionally adopted by the Drafting Committee,⁸ without provisionally adopting any commentaries.

3. At its sixty-ninth session (2017), the Commission established a Working Group to consider the way forward in relation to the topic, as Ms. Jacobsson was no longer with the Commission.⁹ The Working Group, chaired by Mr. Vázquez-Bermúdez, had before it the draft commentaries prepared by the Special Rapporteur, even though she was no longer with the Commission, on draft principles 4, 6 to 8, and 14 to 18 provisionally adopted by the Drafting Committee at the sixty-eighth session, and taken note of by the Commission at the same session. The Working Group recommended to the Commission the appointment of a new Special Rapporteur for the topic to assist with the successful completion of its work on the topic.¹⁰ Following an oral report by the Chairperson of the Working Group, the Commission decided to appoint Ms. Marja Lehto as Special Rapporteur.¹¹

B. Consideration of the topic at the present session

4. At the present session, the Commission established, at its 3390th meeting, a Working Group, chaired by Mr. Vázquez-Bermúdez, to assist the Special Rapporteur in the preparation of the draft commentaries to draft principles 4, 6 to 8, and 14 to 18. The Working Group held two meetings, on 3 and 4 May 2018.

¹ The decision was made at the 3171st meeting of the Commission, on 28 May 2013 (see *Yearbook ... 2013*, vol. II (Part Two), p. 78, para. 167). For the syllabus of the topic, see *Yearbook ... 2011*, vol. II (Part Two), annex V.

² Documents A/CN.4/674 and Corr.1 (preliminary report), A/CN.4/685 (second report) and A/CN.4/700 (third report).

³ *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10 (A/69/10)*, chap. XI.

⁴ *Ibid.*, *Seventieth Session, Supplement No. 10 (A/70/10)*, chap. IX.

⁵ Documents A/CN.4/L.870 and A/CN.4/L.870/Rev.1.

⁶ *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10 (A/71/10)*, para. 188.

⁷ *Ibid.*, chap. X.

⁸ Document A/CN.4/L.876.

⁹ *Official Records of the General Assembly, Seventy-second Session, Supplement No. 10 (A/72/10)*, para. 255.

¹⁰ *Ibid.*, para. 260.

¹¹ *Ibid.*, para. 262.

5. At its 3426th meeting, on 10 July 2018, the Commission provisionally adopted draft principles 4, 6 to 8, and 14 to 18, which had been provisionally adopted by the Drafting Committee at the sixty-eighth session (see section C.1 below).

6. At the same meeting, the Commission began its consideration of the first report of Special Rapporteur Marja Lehto (A/CN.4/720). The Commission continued its consideration of the first report at its 3427th to 3431st meetings, from 11 to 17 July.

7. In her first report, the Special Rapporteur addressed the protection of the environment in situations of occupation. The report offered a general introduction to the protection of the environment under the law of occupation and addressed the complementarity between the law of occupation, international human rights law and international environmental law. The Special Rapporteur proposed three draft principles relating to the protection of the environment in situations of occupation, to be included in a separate part (Part Four). She also made some suggestions for the future programme of work on the topic.

8. At its 3431st meeting, on 17 July 2018, the Commission referred draft principles 19 to 21, as contained in the first report of the Special Rapporteur, to the Drafting Committee.¹²

9. At its ... meeting, on ... July 2018, the Chairperson of the Drafting Committee presented¹³ the report of the Drafting Committee on "Protection of the environment in relation to armed conflicts", containing draft principles 19, 20 and 21 provisionally adopted by the Drafting Committee at the seventieth session (A/CN.4/L.911),¹⁴ which can be found

¹² The draft principles proposed by the Special Rapporteur in her first report read as follows:

"Part Four

Draft principle 19

1. Environmental considerations shall be taken into account by the occupying State in the administration of the occupied territory, including in any adjacent maritime areas over which the territorial State is entitled to exercise sovereign rights.

2. An occupying State shall, unless absolutely prevented, respect the legislation of the occupied territory pertaining to the protection of the environment.

Draft principle 20

An occupying State shall administer natural resources in an occupied territory in a way that ensures their sustainable use and minimizes environmental harm.

Draft principle 21

An occupying State shall use all the means at its disposal to ensure that activities in the occupied territory do not cause significant damage to the environment of another State or to areas beyond national jurisdiction."

¹³ The statement of the Chairperson of the Drafting Committee is available from the website of the Commission (<http://legal.un.org/ilc>).

¹⁴ The text provisionally adopted by the Drafting Committee reads as follows:

"Part Four

Principles applicable in situations of occupation

Draft principle 19

General obligations of an Occupying Power

1. An Occupying Power shall respect and protect the environment of the occupied territory in accordance with applicable international law and take environmental considerations into account in the administration of such territory.

2. An Occupying Power shall take appropriate measures to prevent significant harm to the environment of the occupied territory that is likely to prejudice the health and well-being of the population of the occupied territory.

3. An Occupying Power shall respect the law and institutions of the occupied territory concerning the protection of the environment and may only introduce changes within the limits provided by the law of armed conflict.

Draft principle 20

Sustainable use of natural resources

To the extent that an Occupying Power is permitted to administer and use the natural

on the website of the Commission. The Commission took note of the draft principles as presented by the Drafting Committee. It is anticipated that the Commission will take action on the draft principles and commentaries thereto at the next session.

10. At its ... to ... meetings, on ... 2018, the Commission adopted the commentaries to the draft principles provisionally adopted at the present session (see section C.2 below).

1. Introduction by the Special Rapporteur of her first report

11. The Special Rapporteur recalled the background of the topic, noting that it had been under active consideration by the Commission based on three reports submitted by her predecessor. She also emphasized the continued interest of States in the topic as well as the importance of consultations with the United Nations Environment Programme and the International Committee of the Red Cross. Her first report, which built on previous reports, did not set forth a new methodology and sought to ensure coherence with the work completed thus far. The report proposed three new draft principles on an issue that the Commission had identified for further consideration, namely, the protection of the environment in situations of occupation. The Special Rapporteur reiterated the temporal scope of the topic, which covered the whole conflict cycle and allowed the review of the law of armed conflict, international human rights law and international environmental law.

12. The law of occupation constituted a distinct legal regime, primarily based on the 1907 Hague Regulations and the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV). While these instruments provided only indirect protection to the environment, relevant concepts such as the notions of "civil life" and "usufruct" lend themselves to evolutive interpretation. Furthermore, the law of occupation had to be interpreted in the light of circumstances of the occupation, in particular its stability and duration. The Special Rapporteur recalled that, generally, an occupied territory is expected to be administered for the benefit of the occupied population, not the occupying State.

13. The report addressed the relationship between international human rights law, international environmental law and the law of occupation as *lex specialis*. International jurisprudence confirmed that human rights law applied alongside the law of occupation, while the exact content of the obligations depended on the nature and duration of the occupation. The report focused on the right to health as an example of how human rights law may contribute to environmental protection in the case of occupation. Customary and conventional environmental law also played a role in situations of occupation, particularly in relation to transboundary or global issues. The Special Rapporteur emphasized that such environmental obligations protected a collective interest and were owed to a wider group of States than those involved in an armed conflict or occupation.

14. The report contained proposals for three new draft principles. The Special Rapporteur proposed to place those in a new Part Four, as they could be relevant to armed conflicts as well as the post-conflict phase, depending on the nature of the occupation.

15. Draft principle 19 embedded the obligation of the occupying State to protect the environment in the general obligation to take care of the welfare of the occupied territories. The text of paragraph 1, for which the Special Rapporteur had proposed a reformulation during her introduction, found support in international human rights law and in the jurisprudence of international courts and tribunals. The relevant obligations covered land territory as well as adjacent maritime areas and superadjacent airspace. Paragraph 2

resources in an occupied territory, for the benefit of the population of the occupied territory and for other lawful purposes under the law of armed conflict, it shall do so in a way that ensures their sustainable use and minimizes environmental harm.

Draft principle 21

Due diligence

An Occupying Power shall exercise due diligence to ensure that activities in the occupied territory do not cause significant harm to the environment of areas beyond the occupied territory."

reiterated the obligation of the occupying State to respect, unless absolutely prevented, the legislation of the occupied territory pertaining to the protection of the environment.

16. Draft principle 20 was based on the principle of usufruct as found in article 55 of the 1907 Hague Regulations while it also drew on the principle of sustainable use as its modern equivalent. It provided that the occupying State should exercise caution in the exploitation of non-renewable resources and exploit renewable resources in a way that ensured their long-term use and capacity for regeneration. The practical application of the principle would depend on the nature and duration of the occupation. The wording of draft principle 20 was based on article 54, paragraph 1, of the Berlin Rules on Water Resources as adopted by the International Law Association.¹⁵

17. Draft principle 21 incorporated the principle not to cause harm to the environment of another State. A central principle in international environmental law, the "no harm" principle applied to situations of occupation, as confirmed in international jurisprudence and Commission's earlier work. The wording was derived from the judgment of the International Court of Justice in *Pulp Mills on the River Uruguay*.¹⁶ The words "at its disposal" notably allow for flexibility depending on the prevailing circumstances.

18. The Special Rapporteur further explained that the principles in Part One and Part Two applied to situations of occupation, and proposed to clarify in the commentary to draft principles 15 to 18, contained in Part Three, that they were also relevant to situations of occupation.

19. As to future work, the Special Rapporteur expressed the intention to address in her next report certain questions relating to the protection of the environment in non-international armed conflicts, questions relating to responsibility and liability for environmental harm in relation to armed conflicts, and issues related to the consolidation of a complete set of draft principles.

2. Summary of the debate

(a) General comments

20. Members supported the continuation of the methodology adopted by the previous Special Rapporteur, in particular the temporal approach to the topic. At the same time, it was reiterated that a strict temporal division might not always be feasible. A number of members agreed with the Special Rapporteur that the Commission should not seek to change international humanitarian law relating to occupation, but rather to fill gaps relating to environmental protection.

21. Some members supported the addition of a separate Part Four, dealing specifically with occupation. Some others insisted that occupation fell exclusively within the armed conflict phase (Part Two), while yet others maintained it related to the post-armed-conflict phase (Part Three). Several members supported the proposal of the Special Rapporteur to extend the application of certain draft principles already provisionally adopted by the Commission to the situation of occupation and noted that this should be indicated in the commentaries. It was proposed by some members to indicate in a separate draft principle that the draft principles in Parts One, Two and Three applied *mutatis mutandis* to situations of occupation.

22. Some members held that the report presented little State practice to bolster its findings, while others called for the inclusion of State practice from a wider variety of regions. Some members called for a definition of the concept of occupation, either in the commentary or in the text of the draft principles. Others maintained that providing a definition would not be necessary, while recognizing that situations of occupation may vary in nature and duration. It was also suggested by some members to take into consideration

¹⁵ Berlin Rules on Equitable Use and Sustainable Development of Waters (International Law Association, *Report of the Seventy-First Conference, Berlin, 16–21 August 2004*, London, 2004, pp. 334 et seq., at p. 397).

¹⁶ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14.

the legality or illegality of the occupation and to exclude the applicability of the occupation law to situations resulting from unlawful use of force.

23. Several members suggested addressing the issue of the applicability of the law of occupation to international organizations in the draft principles or in the commentaries. While some members suggested that international organizations could exercise functions similar to those of an Occupying Power, other members questioned this proposition. It was noted by some members that the international administration of a territory by an international organization was very different in nature to a belligerent occupation.

24. Several members suggested replacing the term "occupying State" with a more general reference to "Occupying Power", which was the term used in the relevant treaties.

25. Several members noted that, while the law of armed conflict predated international environmental law, the former had to be interpreted so as to incorporate elements of the latter. Others did not favour an evolutionary interpretation of the law of armed conflict.

26. Members noted that the law of occupation was a subset of the law of armed conflict, which only offered "indirect" protection to the environment. Members generally agreed that international human rights law and international environmental law continued to apply in situations of occupation, while the specificities of the law of armed conflict were to be taken into account. According to some members, international humanitarian law, as *lex specialis*, could set aside those bodies of law if the situation of occupation so required. Other members maintained that, in situations of occupation, military necessity did not override — but had to be balanced against — international human rights law and international environmental law obligations.

27. Several members emphasized that the application of international human rights law and international environmental law depended on the type of occupation, its nature and duration. In this regard, some members proposed drawing a distinction between different forms of occupation, such as "belligerent" or "military" occupation and "peaceful" or "prolonged" occupation or "colonial" occupation. Other members pointed out that the focus of the report was on belligerent occupation and that such a distinction was therefore not necessary in this context.

28. Some members questioned the link drawn by the Special Rapporteur between the protection of property rights in situation of occupation and the protection of the environment. It was pointed out that harm to public or private property could not necessarily be equated to damage to the environment. Others maintained that the protection of the environment had become a core task of the modern State, and that the concept of "usufruct" could be interpreted in the current legal context to accommodate environmental considerations.

29. A number of members also noted that, while a significant part of the report dealt with international human rights law, the Special Rapporteur had not proposed a draft principle on that basis. Several members suggested the addition of a new draft principle, or a new paragraph, addressing the relevance of international human rights law, while some members were doubtful about the proposal and saw it as beyond the scope of the topic.

30. While agreeing that the right to health was relevant to the protection of the environment, several members encouraged the Special Rapporteur to extend her analysis to include other human rights, such as the right to life, the right to water and the right to food. A suggestion was made to focus on particularly vulnerable populations.

(b) *Comments on draft principle 19*

31. Members generally expressed support for the oral revision of paragraph 1 of draft principle 19 made by Special Rapporteur during her introduction of the report, while some members asked for further clarification of the proposed formulation. In particular, several members called for clarification of certain terms, including "general obligation", "environmental considerations" and "administration", or for reconsideration of the use of the words "territorial State" and "sovereign rights".

32. Some members questioned the reference to the maritime areas and airspace of the occupied territory. Other members maintained that the authority was limited to the areas over which the occupying State had established its authority and exercised effective control.

33. With regard to paragraph 2, members supported the position of the Special Rapporteur that an occupying State had a general obligation to respect the legislation of the occupied territory with regard to environmental protection. A number of members suggested that the Occupying Power enjoyed greater latitude to alter environmental legislation than the wording of paragraph 2 permitted, particularly to enhance the protection of the population. The view was expressed that in such cases the local population had to be consulted.

34. It was suggested that, apart from domestic legislation, occupying States should respect the international obligations pertaining to the protection of the environment that were incumbent on the occupied territory. It was also suggested that an occupying State was bound to its own obligations under international law.

35. Several drafting suggestions were made with regard to draft principle 19, including the addition of a further paragraph to the draft principle to reflect the role of international human rights law.

(c) Comments on draft principle 20

36. With regard to draft principle 20, some members supported the term "sustainable use", while a view was expressed that the term should be clarified. Other members expressed the view that the principle of sustainable use constituted a policy objective, rather than a legal obligation, and questioned its application to situations of occupation. Some members also questioned the link with the concept of usufruct, and how this concept applied to different categories of property, including private property, public goods and natural resources. Other members stressed that occupying States ought to consider sustainability in the administration and exploitation of natural resources.

37. In this regard, a number of members emphasized the importance of the principles of permanent sovereignty over natural resources and of the self-determination of peoples for the draft principles, while other members questioned the relevance of these principles.

38. Members emphasized that the Occupying Power should act for the benefit of the people under occupation, not for its own benefit. A suggestion was made to broaden the principle to apply to economic and social development of the occupied State more generally.

39. Some members also questioned the term "minimize" environmental harm, while a view was expressed that "prevent" would be more appropriate. The view was expressed that in situations of occupation, the focus was on eliminating and repairing environmental damage, in light of the draft principles contained in Part Three, rather than on the administration of natural resources.

40. Several drafting proposals were made with regard to draft principle 20.

(d) Comments on draft principle 21

41. Members generally expressed support for the inclusion of the no-harm or due diligence principle in draft principle 21, although a view was expressed that the principle had no place in the project. A suggestion was made to include therein the obligation to cooperate to prevent, reduce and control transboundary environmental pollution.

42. Certain drafting suggestions or clarifications were proposed, including with regard to the phrases "all the means at its disposal", "significant damage" and "areas beyond national jurisdiction". It was also suggested that the no-harm principle be extended to situations of armed conflict beyond occupation.

(e) Future work

43. Support was expressed for the proposals by the Special Rapporteur regarding future work on the topic. It was suggested that, in her next report, the Special Rapporteur address

the extent to which the draft principles apply to non-international armed conflicts; enforcement measures; compensation for environmental damage; and questions of responsibility and liability. The Special Rapporteur was also encouraged to clarify the role and obligations of non-State actors. A suggestion was made to elaborate on the relevance of the precautionary and "polluter pays" principles with regard to the topic, although opposition to this proposal was expressed.

44. Support was also expressed for completing the first reading on the topic in 2019, although it was noted that this was an ambitious goal.

3. Concluding remarks of the Special Rapporteur

45. Regarding the applicability of the law of occupation to international organizations, the Special Rapporteur noted that such law may have relevance to the administration of a territory, in particular to United Nations missions, provided that they entail the exercise of functions and powers over a territory that are comparable to those of an occupying State under the law of armed conflict. The Special Rapporteur pointed out that, even considering that the law of occupation could complement the mandate laid down in the relevant Security Council resolutions, there was very little actual practice of having recourse to the law of occupation for such purpose. This remained a theoretical possibility, and the issue was not mature enough to be addressed in the draft principles. The Special Rapporteur proposed to replace the term "occupying State" in the draft principles by the expression "Occupying Power", which could leave the door open for further developments in this regard.

46. The Special Rapporteur stressed that the distinction between belligerent occupation and pacific occupation had lost much significance, and that the presence of armed forces based on an agreement were already largely covered by draft principles 7 and 8. She reiterated that the focus of the report and of the draft principles was on belligerent — or military — occupation. In addition, the Special Rapporteur considered that no distinction between different forms of occupation was needed, since the law of armed conflict did not distinguish between different types of occupation. At the same time, the Special Rapporteur pointed out that the obligations of the occupying State under the law of occupation were to a certain extent dependent on the prevailing situation, and that a certain flexibility was thus recognized in its implementation.

47. With respect to the interplay of different areas of international law, the Special Rapporteur indicated that the requirements of the law of occupation as *lex specialis*, as well as the concrete realities of the situation, affected the extent to which other areas of international law, such as international human rights law and international environmental law, may complement the law of armed conflict. This did not mean that humanitarian principles, human rights and environmental considerations could be ignored, as the jurisprudence of the International Court of Justice made clear. The question therefore was not whether certain peacetime rules applied in situations of armed conflict or occupation, but how they applied.

48. On the general issue of the legality or illegality of occupation, the Special Rapporteur noted that the law of armed conflict applied whenever the criteria of armed conflict were fulfilled, regardless of the reasons of the conflict. She stressed that occupation law, from the perspective of international humanitarian law, applied equally to all occupations, whether or not they were the result of force used lawfully within the *jus ad bellum*.

49. The Special Rapporteur indicated that, although the first report focused on the right to health, other human rights were relevant from the point of view of environmental protection. She concluded that such rights could usefully be addressed in the commentary. The Special Rapporteur suggested that the relationship between the draft principles proposed in the first report and the draft principles already adopted by the Commission be clarified in the commentary.

50. The Special Rapporteur noted that the reformulation proposed in her introduction was generally supported. She added that the term "general obligation" was used in reference to article 43 of the Hague Regulations, which set forth the obligation of the

occupying State to restore and maintain public order and civil life. Such an obligation must be interpreted in light of current circumstances, including the importance of environmental concerns as an essential interest of all States and taking into account the development of international human rights law. She also indicated that the term "environmental considerations" were context-dependent and evolving, as indicated in the commentary to draft principle 11. The Special Rapporteur also indicated that latter part of paragraph 1, concerning the territorial scope of draft principle 19, could be addressed in the commentary. Regarding the second paragraph of draft principle 19, the Special Rapporteur acknowledged the usefulness of making reference to the international obligations of the occupied State, in addition to its legislation. Finally, the Special Rapporteur expressed her agreement with the proposal made by several members to include a provision related to the human rights obligations of the occupying State.

51. As regards draft principle 20, the Special Rapporteur noted that the first issue concerned the limits of the Occupying Power's right to administer and use the resources of the occupied territory. In that respect, she indicated that the proposal to add wording, either in the draft principle or the commentary, along the lines of the Institute of International Law's Bruges Declaration on the Use of Force,¹⁷ could be useful. She added that the principle of permanent sovereignty over natural resources was also to be taken into account. Regarding the mention of "minimizing environmental harm", the Special Rapporteur stressed that the purpose of draft principles, as indicated in draft principle 2, was to enhance "the protection of the environment in relation to armed conflict, including through preventive measures for minimizing damage to the environment during armed conflict". Further, the Special Rapporteur recalled that draft principle 20 was grounded on article 55 of the Hague Regulations, which is binding as customary international law and should be interpreted to involve environmental aspects. In addition, the concept of sustainability, in particular in the context of sustainable use of natural resources, was well established, as reflected in the adoption by the General Assembly of the 2030 Agenda for Sustainable Development and the 17 Sustainable Development Goals.¹⁸

52. The Special Rapporteur indicated that draft principle 21 had met with broad agreement. In addition to the current language, two alternatives were supported deriving either from the advisory opinion of the International Court of Justice concerning the *Legality of the Threat or Use of Nuclear Weapons*¹⁹ or from the Commission's draft articles on the prevention of transboundary harm from hazardous activities.²⁰

53. Regarding future work on the topic, the Special Rapporteur clarified that her intention was to address non-international armed conflicts, as well as the questions of responsibility and liability, in the context of the topic and not to give a comprehensive presentation of these two areas. She noted that it would not be advisable to expressly limit the draft principles to one type of armed conflict given that the development of customary international law had a tendency to progressively reduce the importance of the distinction between international and non-international armed conflicts. This was also in line with the approach taken by the Commission on the topic so far.

¹⁷ Institute of International Law, *Yearbook*, vol. 70, Part II, Session of Bruges (2003), pp. 285 *et seq.*; available from www.idi-iil.org, Declarations.

¹⁸ General Assembly resolution 70/1 of 25 September 2015.

¹⁹ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226.

²⁰ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 146 *et seq.*